



**NATIONAL
CABLE TELEVISION
COOPERATIVE, INC.**

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President and
Chief Executive Officer

September 20, 2006

VIA HAND DELIVERY

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20554

Re: MB Docket No.03-124

Dear Chairman Martin:

I am writing in response to Lindsay Gardner's August 24, 2006 letter concerning the ongoing disagreement between Fox Cable Networks ("Fox") and the National Cable Television Co-operative, Inc. ("NCTC") regarding the implementation of the bargaining agent condition in the *News-Hughes Merger Order* – a dispute that is frustrating the desire of hundreds of small cable companies to exercise the collective bargaining rights expressly granted to them by the Commission in the *News-Hughes Merger Order*. When I first wrote to you regarding this matter on July 25, 2006, it was still NCTC's hope that Fox would voluntarily agree that small cable companies could share with NCTC such relevant contract information as is necessary for NCTC to effectively serve as their bargaining agent in negotiating for carriage of Fox-affiliated regional sports networks ("RSNs") (and that they are not worse off for having invoked the *New-Hughes Merger Order* bargaining agent condition instead of attempting to negotiate on their own). Unfortunately, Fox continues to obfuscate regarding its obligation to engage in collective bargaining with small cable companies, as exemplified by Mr. Gardner's latest missive, in which he feebly erects a number of strawmen in a further attempt to render that important obligation a nullity. If anything, Mr. Gardner's efforts have now made it clear that Fox has no intention – and apparently never intended – to honor the commitment it made to the Commission to abide by the bargaining agent condition in the *News-Hughes Merger Order*.

Strawman Argument Number One: NCTC is seeking a "right" to confidential information without the "corresponding responsibility of binding those members" on whose behalf it negotiates. Mr. Gardner expressly acknowledges that

the *News-Hughes Merger Order* imposes a collective bargaining obligation upon Fox, thereby giving small cable companies the "right" to appoint a bargaining agent for RSN negotiations. Mr. Gardner further confirms that "if cable operators seek the advantages of allowing NCTC to 'stand in their shoes' during these negotiations with Fox, then such bargaining agent must be willing to accept the consequences of doing so." NCTC agrees with Mr. Gardner on both of these points. We disagree, however, with Mr. Gardner's subsequent erroneous assumptions. Mr. Gardner incorrectly states that NCTC has now asked for "the right to receive confidential information from its members without the corresponding responsibility for binding those members to any carriage agreement reached, even as a result of arbitration." This statement blatantly mischaracterizes the *News-Hughes Merger Order* and misrepresents NCTC's position regarding its responsibilities under the bargaining agent condition.

Contrary to Mr. Gardner's assertions, NCTC recognizes that if its efforts at collective bargaining with Fox do not produce an agreement and NCTC elects to invoke arbitration under the *News-Hughes Merger Order*, the resulting carriage agreement will be binding on the companies represented by NCTC during that proceeding. Prior to the initiation of the arbitration process, however, NCTC is not required (just as individual companies would not be required if they negotiated on their own behalf) to limit itself to seeking any particular form of a contract with Fox or to specify in advance the terms thereof. Under the *News-Hughes Merger Order*, an individual cable operator can negotiate with Fox for any type of agreement it wishes. So can NCTC and Mr. Gardner's suggestions to the contrary are nonsensical.

Thus, for example, an individual operator might seek to negotiate an agreement for RSN carriage that expires after only one or two years or an agreement that bundles RSN carriage with carriage of other Fox networks. Or the operator might propose a longer term agreement or a stand-alone contract. No matter what type of agreement or terms the operator seeks, the operator has the right, pursuant to the *News-Hughes Merger Order*, to seek arbitration if the negotiations reach an impasse. Then, and only then, does the *News-Hughes Merger Order* limit the type and terms of the agreement that the parties can propose by specifying that the proposals submitted to arbitration must be for a binding agreement for the carriage of the RSN programming "for a period of at least three years" and with no provision for the carriage of "any video programming networks or any other service other than the RSN." The fact that the limitations imposed on the terms of the arbitration proposal do not apply to the pre-arbitration negotiations could not be clearer. The "Rules of Arbitration" stated in the *News-Hughes Merger Order* expressly preclude the arbitrator, in making its decision, from considering offers made prior to the arbitration.

To reiterate: NCTC acknowledges that should it reach an impasse in negotiating an RSN agreement with Fox, it can subsequently invoke arbitration, but in so doing, it will be committing the companies that it represents in that proceeding to accept and be bound by a stand-alone agreement to carry the programming in question for at least three years. However, until the arbitration mechanism is invoked, NCTC is entitled -- no less

than the companies that it represents would be entitled themselves -- to propose and bargain for any terms and conditions it chooses.

Strawman Argument Number Two: Fox cannot enter into a binding RSN carriage agreement with NCTC because doing so might violate the antitrust laws. Having argued that the terms of the *News-Hughes Merger Order* require NCTC to bargain collectively for an agreement binding on the companies that it represents, Mr. Gardner next argues that Fox cannot enter into such a binding agreement with NCTC because by doing so it would "risk becoming embroiled in an antitrust law violation." The cynicism and hypocrisy displayed in this "Catch 22" argument is breathtaking. Fox agreed to the bargaining agent condition in the *News-Hughes Merger Order* with the clear knowledge and understanding that the basis for the condition was the FCC's determination that such a condition would "counter-balance the increase in News Corp.'s market power with respect to RSN programming" and was necessary to provide a "useful" procedure for small companies that would be "far less able to bear the costs of commercial arbitration" on their own. Yet, Fox now has the audacity to object to dealing with NCTC because of purported concerns about the "greater market share" of the companies appointing NCTC as their bargaining agent. The Commission should not countenance this utterly meritless argument.

Strawman Argument Number Three: Disclosure of current RSN-related contract terms to NCTC will allow the represented companies to gain access to each other's confidential information. Mr. Gardner's letter notes that when Fox negotiates directly with a cable multiple system operator ("MSO"), that MSO does not "have access to confidential information from Fox's deals with other MSOs." His letter intimates that NCTC is seeking the right not only to obtain information from the companies that it represents, but also for that information to be shared among the various companies. Mr. Gardner also expresses concern that NCTC could use information disclosed to it for purposes of collectively negotiating RSN agreements in its negotiations for other programming.

Mr. Gardner's assertions are misleading and nothing more than an attempt to distract the Commission from the issue at hand. NCTC has specifically limited its request to information that is relevant to existing or expired agreements for the carriage of RSN programming. This includes, of necessity, agreements in which Fox has intentionally "bundled" RSN carriage and carriage of other non-RSN programming into a single agreement. Thus, in the event that Fox previously has incorporated additional service(s), such as Fox College Sports or Fuel, into the negotiation of a member's RSN carriage agreement, then the terms of that bundled affiliation agreement are a relevant and material form of consideration for the agreement to carry the Fox-affiliated RSN. These relevant affiliation agreements are an integral factor in the overall value and costs of the RSN and, as such, can neither be ignored nor dismissed. This very strawman illustrates Fox's attempt to evade meeting its obligation to negotiate in good faith with a bargaining agent. As Mr. Gardner is fully aware, "bundled" affiliation agreements are commonplace and the critical information contained in such an agreement would be

immediately accessible to a company negotiating on its own behalf; as such, it should be made equally available to the bargaining agent who would 'stand in their shoes' of the represented company.

As for Mr. Gardner's concerns about the potential for abuse of the disclosed information, his argument is, as noted, a red herring. NCTC has plainly and directly addressed such concerns in its previous letters. For example, as my August 7, 2006 letter pointed out, any information disclosed to NCTC by small cable companies that appoint it to act as their bargaining agent would be subject to confidentiality protections that would "ensure that the information is used only for limited purposes and is not disclosed to any of NCTC's members or to third parties other than NCTC's attorneys."

Strawman Argument Number Four: NCTC has not needed access to confidential information from its members to negotiate other carriage agreements with Fox. Mr. Gardner's reference to the fact that NCTC has not historically needed nor requested access to the confidential terms of its members' existing agreements intentionally, and misleadingly, obscures the distinction between national network deals and regional based services such as the RSNs. It is this very distinction between national versus local-regionally delivered content that the RSN bargaining agent condition sought to address and which makes it essential that NCTC be granted access to the relevant RSN agreements of the companies that seek to avail themselves of that condition.

To explain more fully, the negotiation of nationally delivered networks generally requires a thorough knowledge of the affected service, including national audience, rating performance, content distinctions, local advertising appeal, etc. These factors, coupled with overall industry experience, trade publication references, and other publicly available sources of information regarding other distributors' distribution of the service, perceived service value and estimates of subscriber fees paid establish a "comparable marketplace" baseline from which to negotiate nationally delivered networks.

In stark contrast, the negotiation of a local-based and "regionally-valued" service such as a regional sports network is dramatically different. An RSN's value varies from one operator to the next, and from one cable system (or even portion of a cable system) to the next. That value is predicated upon the specific content delivered and the locality to which it is delivered. Often a RSN will group various localities within its footprint into "zones", which are generally determined by the counties served by a respective operator and the distances from the core sporting arena(s) covered by the RSN. The price discrepancies between zones on any one regional sports service often widely vary. These zones and the applicable rate structures, along with an operator's service area designation, are arbitrarily established by Fox for each RSN. Additionally, each RSN's value is inextricably linked to the professional team product and number of respective live and marquee events carried on the RSN. Consequently, the term of RSN carriage agreements often is tied to the term of the RSN's agreements with the teams or leagues that it features. Sports content, as it pertains to a particular team or a professional league, will be valued differently by the subscriber base, from county to county, and from

distributor to distributor. As such, access to such baseline information regarding an RSN's content (number of events, teams, and league coverage), specified zone distinctions, any applicable "surcharge" product, county allocations and distances, length of term, and all other material terms and conditions is critical in order for a bargaining agent such as NCTC to engage in the type of collective negotiations with Fox contemplated by the *News-Hughes Merger Order*.

Strawman Argument Number Five: Fox needs to know exactly which small cable companies are interested in appointing NCTC to act as bargaining agent under the *News-Hughes Merger Order* before it can decide whether those companies are allowed to share essential contract information with their appointed agent. In my letter to you dated August 7, 2006, I explained that it would be irrational for small cable companies to commit to the *News-Hughes Merger Order* bargaining agent process without first obtaining assurance that they can contractually provide that agent with the information needed to effectively represent them. Matthew Polka's August 18, 2006 letter to you on behalf of the American Cable Association echoed this point and noted that "at least 100 ACA members are eager to have NCTC serve as their bargaining agent" once they receive assurance that they can provide NCTC with relevant contract information. Yet, Mr. Gardner continues to obsess over the identity of the companies that are interested in having NCTC serve as their bargaining agent, complaining that neither NCTC nor ACA "have named a single such operator that has engaged NCTC for this purpose."

Fox's insistence on knowing which operators are discussing entering into an agency arrangement with NCTC under the terms of the *News-Hughes Merger Order* is curious and raises a red flag. In my August 7, 2006 letter, I made clear that NCTC will provide Fox with the names of those companies on whose behalf it has been appointed to negotiate, once the issues regarding the rights of those companies under the *News-Hughes Merger Order* have been clarified and they have formally designated NCTC as their bargaining agent. However, both NCTC and the small cable companies that have expressed an interest in appointing NCTC as their agent are concerned that disclosing those names to Fox in advance of an agency relationship could expose and subject those companies to pressure and retaliation by Fox. I should add that the number of small cable companies that have expressed interest in having NCTC serve as their bargaining agent for Fox-affiliated RSN agreements has grown to over 330. NCTC would be happy to share a list of these companies with the Commission, subject to an appropriate confidentiality agreement that would protect against the premature disclosure of this information to Fox.

Strawman Argument Number Six: Allowing companies that are represented by a bargaining agent to continue carriage of Fox-affiliated RSNs under the terms of an expired agreement while negotiations and arbitration for a new agreement are pending would create a "new right" not contemplated by the *News-Hughes Merger Order*. For the first time, Fox challenges NCTC's understanding of the provisions of the *News-Hughes Merger Order* that grant cable operators the right to continue to carry a

Fox-affiliated RSN under the terms of an expired agreement while negotiations and arbitration for a new agreement are pending. According to Mr. Gardner, NCTC is attempting to “imply a new right that could vastly expand the arbitration condition” imposed upon News Corp. This assertion by Mr. Gardner is simply incorrect and it is a disturbing reflection of Fox’s pinched view of its obligations under the *News-Hughes Merger Order* collective bargaining condition (and its apparent intent to frustrate the effective implementation of that condition).

Under Fox’s distorted reading of the RSN collective bargaining condition, if a small cable company elects to negotiate through a bargaining agent for carriage of a Fox-affiliated RSN and its current carriage agreement for that RSN expires during the course of those negotiations or while arbitration is pending, the operator must immediately cease carriage of the RSN. In contrast, if the operator foregoes the right to negotiate through a bargaining agent and attempts to go it alone, it will have the right (accorded to all larger companies) to continue to carry the RSN through the end of the arbitration process. Fox undoubtedly realizes that under its approach, no small company would dare elect the bargaining agent option for fear of losing access to their existing RSN programming.

Strawman Argument Number Seven: The Commission has definitively pronounced that the expiration date of a represented company’s current RSN agreement is “the sole item of information” from that agreement that a company is entitled to share with its bargaining agent. Mr. Gardner again drags out the argument that the Commission already has clarified that bargaining agents are entitled only to the expiration dates of the contracts of the companies that they represent, citing language in a condition imposed in the order approving the Time Warner/Comcast/Adelphia transactions. The flaws in Mr. Gardner’s argument are threefold. First, nothing in the Adelphia transactions order indicates that it should be read as applying to or altering or amending the conditions imposed on Fox in the *News-Hughes Merger Order*. Second, nothing in the Adelphia transactions order suggests that the Commission intended to restrict those companies from disclosing other relevant contract information, in addition to the expiration date. Third, taken at face value, Mr. Gardner’s argument suggests that it is News Corp.’s position that the Commission intended in the *News-Hughes Merger Order* to preclude small cable companies from providing even contract expiration information to their appointed bargaining agents – a position that is absurd on its face, and an interpretation which would wholly eviscerate both the collective bargaining agent and the arbitration provisions of that Order.

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Mr. Chairman, notwithstanding Fox’s obfuscations, the issue presented is really quite simple. The Commission imposed the bargaining agent condition in the *News-Hughes Merger Order* in order to level the playing field between one of the nation’s largest vertically integrated media companies and the small cable companies that compete with that company for subscribers, yet also depend upon it for must-have RSN programming. Under the interpretation of the condition espoused Fox, appointing a

bargaining agent would not level the playing field; rather, it would tilt it even further in Fox's favor. In essence, small cable operators opting to take advantage of the bargaining agent condition would be forced to negotiate – and develop a single arbitration proposal – blindfolded, while Fox would have access not only to information regarding the terms and conditions of its existing agreements with the parties to the negotiation and arbitration, but also to the terms and conditions of all of their other RSN agreements. A less “level” playing field is difficult to imagine.

The need for a resolution of this matter is acute. The *News-Hughes Merger Order* conditions expire three years from this coming January. Delay and obfuscation may serve Fox's interest in avoiding having to comply with the conditions imposed upon it, but they will not serve the public interest as reflected in the adoption of those conditions. NCTC stands ready to meet with the Commission, individually or together with representatives of Fox, in order to discuss any specific actions reasonably needed to protect either NCTC or Fox while still ensuring that the bargaining agent condition is, as the Commission intended, a “useful procedure.”

Respectfully submitted,



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NCTC

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